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A

Public Prosecutor v Syahril bin Razali

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–329–12 OF 2012
BALIA YUSOF, ABDUL AZIZ AB RAHIM AND TENGKU MAIMUN JJCA
20 SEPTEMBER 2013

C

Criminal Law — Murder — Intention — Whether evidence did not show accused intended to kill deceased — Whether accused strangled deceased in spur-of-the-moment rage caused by deceased's comments — Whether comments insufficient to amount to 'grave and sudden provocation' — Whether accused's D *conduct after causing death inconsistent with someone who intended to kill — Whether pathologist's opinion 30 seconds of strangulation necessary to cause death by asphyxia insufficient by itself to show intention to kill — Whether burden on prosecution to show accused knew such length of time of strangulation required to cause death*

E

The respondent ('Syahril'), who had fatally strangled his girlfriend ('the deceased') in a crime of passion, was sentenced to 20 years' jail by the High Court for causing her death. The respondent was originally charged with her murder but the court reduced the charge to culpable homicide not amounting F to murder after hearing his defence. The respondent had testified that he was married with two children at the time he befriended the deceased who was a guest relations officer at a night club. Friendship grew into love and the respondent divorced his wife and rented a room to stay with the deceased. The respondent wanted to marry the deceased and she had promised to do so but G she always said she was not ready to marry whenever the subject was brought up. The respondent testified that the deceased on many an occasion accused him of still being in love with his ex-wife and for using the pretext of visiting his children to keep seeing her. The respondent said on the day in question, after they had sex, he again asked the deceased to marry him but she again said she H was not ready and accused him of being 'crazy' about his ex-wife and told him to go back to her. The respondent said he became so enraged that he slapped her and then grabbed her by the neck and shook her several times before he left the place to go to a restaurant to have a meal and to 'cool down'. The respondent said he tried calling the deceased on her hand phone from the I restaurant but she did not answer. He then returned to the room but found the deceased lying down lifeless. The respondent said he immediately went to see his father, his aunty and his uncle and told them what had happened. On their advice, he surrendered to police who went to the premises and found the deceased's body. The pathologist testified that the deceased died of asphyxia

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due to manual strangulation and that there were no defensive injuries to show she had defended herself when strangled. In reducing the charge to culpable homicide not amounting to murder, the High Court held that the evidence showed the respondent did not intend to kill the deceased or to cause her such bodily injury as would have caused her death but that his act was a crime of passion resulting from grave and sudden provocation from the deceased. In the instant appeal, the prosecution contended that the trial court should have found the respondent guilty of murder as his act of strangling the deceased using excessive force was intentional and that according to the pathologist's testimony, pressure to a person's neck would have to be continuously applied for about 30 seconds before it could cause death by asphyxia.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The court agreed with the trial court's finding that the prosecution had failed to prove intention on the part of the respondent to cause the deceased's death. This was despite the fact the defence of grave and sudden provocation was not available to the respondent. The trial court was right to find that at the spur of the moment, the respondent had, without realising it, used excessive force; but with no intention to kill or to cause such injuries as were likely in the ordinary cause of events to cause the deceased's death (see paras 27 & 32).

(2) The respondent's reaction towards the deceased at the spur of the moment was natural. The thought of killing her for rejecting his marriage proposal would not have crossed his mind because the evidence showed he was in love with her to the extent he was willing to leave his wife and children for the deceased. The trial court had judicially appreciated the evidence of the respondent's state of mind when he shook the deceased by holding her neck (see para 28).

(3) The respondent's actions and conduct immediately after the event also did not show the presence of intention to kill. On returning to the house after calming himself at a nearby coffee shop and discovering the deceased dead, the respondent immediately went to see his father, uncle and another person and told them what had happened and on their advice he surrendered to the police. Such conduct was inconsistent with the conduct of a person who had an intention to kill the deceased (see para 31).

(4) With regard to the pathologist's evidence that pressure to the neck for about 30 seconds would cause death by asphyxia, the court was of the view that that opinion was insufficient to show intention to kill. It was incumbent upon the prosecution to have shown that the respondent had knowledge that pressing a person's neck for 30 seconds would probably cause death by asphyxia (see para 32).

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[Bahasa Malaysia summary

Responden ('Syahril'), yang telah secara fatal mencekik teman wanitanya (si mati) dalam jenayah asmara, dihukum 20 tahun penjara oleh Mahkamah Tinggi kerana menyebabkan kematian si mati. Responden pada awalnya didakwa membunuh teman wanitanya tetapi mahkamah mengurangkan dakwaan kepada pematian salah bukan membunuh selepas mendengar pembelaannya. Responden memberi keterangan bahawa dia telah berkahwin dan mempunyai dua orang anak semasa dia berkawan dengan si mati yang merupakan pegawai perhubungan awam di kelab malam. Persahabatan bertukar kepada cinta dan responden telah menceraikan isterinya dan menyewa sebuah bilik untuk tinggal bersama si mati. Responden mahu mengahwini si mati dan si mati berjanji untuk berkahwin tetapi si mati selalu menyatakan bahawa dia tidak bersedia untuk berkahwin apabila perkara itu dikemukakan. Responden memberi keterangan bahawa si mati kerapkali menuduhnya masih mempunyai perasaan terhadap bekas isterinya dan menggunakan alasan melawat anak-anak untuk berjumpa dengan bekas isteri. Responden menyatakan pada hari tersebut, selepas mereka mengadakan hubungan seks, dia sekali lagi meminta si mati mengahwininya tetapi sekali lagi si mati menyatakan dia tidak bersedia dan menuduhnya masih 'crazy' terhadap bekas isteri dan menyuruh dia kembali kepada bekas isterinya. Responden mengatakan dia menjadi berang dan telah melempang si mati dan kemudiannya memegangnya di leher dan menggoncangkannya beberapa kali sebelum dia pergi ke restoran untuk makan dan 'cool down'. Responden menyatakan bahawa dia cuba menghubungi si mati melalui telefon bimbitnya dari restoran tetapi tidak berjawab. Dia kemudian pulang ke bilik tetapi mendapati si mati terbaring tidak bernyawa. Responden berkata dia segera pergi berjumpa dengan ayah, mak cik dan pak ciknya dan memberitahu mereka apa yang terjadi. Atas nasihat mereka, dia menyerah diri kepada pihak polis yang mana telah pergi ke premis dan menjumpai mayat si mati. Pakar patologi memberi keterangan bahawa si mati meninggal dunia akibat afiksia disebabkan oleh cekikan dan bahawa tiada kecederaan pertahanan untuk menunjukkan dia mempertahankan dirinya apabila dicekik. Dalam mengurangkan dakwaan kepada pematian salah bukan membunuh, Mahkamah Tinggi memutuskan bahawa keterangan menunjukkan responden tidak berniat untuk membunuh atau menyebabkan kecederaan tubuh badan kepada si mati yang menyebabkan kematian si mati, tetapi tindakannya adalah jenayah asmara, akibat daripada bangkitan marah besar dan mengejut daripada si mati. Dalam rayuan ini, pihak pendakwaan menegaskan bahawaa mahkamah perbicaraan sepatutnya mendapati responden bersalah kerana membunuh kerana tindakannya mencekik si mati dengan menggunakan kekuatan melampau adalah disengajakan dan bahawa menurut pakar patologi, tekanan di leher seseorang hendaklah dikenakan secara berterusan selama 30 saat sebelum ia boleh menyebabkan kematian secara afiksia.

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Diputuskan, menolak permohonan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Mahkamah bersetuju dengan dapatan mahkamah perbicaraan bahawa pihak pendakwaan gagal untuk membuktikan niat di pihak responden untuk menyebabkan kematian si mati. Ini adalah walaupun hakikatnya pembelaan bangkitan marah besar dan mengejut tidak ada untuk responden. Mahkamah perbicaraan adalah betul untuk mendapati bahawa pada ketika itu, responden telah, tanpa disedarinya, menggunakan kekuatan melampau, tetapi dengan tiada niat untuk membunuh atau menyebabkan kecederaan yang mana boleh dalam kausa kejadian biasa menyebabkan kematian si mati (lihat perenggan 27 & 32).

(2) Reaksi responden terhadap si mati pada ketika itu adalah semula jadi. Niat untuk membunuhnya kerana menolak lamaran perkahwinan tidak akan terlintas difikirannya kerana keterangan menunjukkan responden mencintai si mati sehinggakan dia sanggup meninggalkan isteri dan anak-anaknya demi si mati. Mahkamah perbicaraan telah menilai secara kehakiman keterangan keadaan minda responden apabila dia menggoncangkan si mati dengan memegang lehernya (lihat perenggan 28).

(3) Tindakan-tindakan dan kelakuan responden dengan serta-merta selepas kejadian juga tidak menunjukkan terdapat niat untuk membunuh. Apabila pulang ke rumah selepas bertenang di kedai kopi berdekatan dan mendapati si mati telah meninggal dunia, responden serta-merta pergi berjumpa ayah, pak ciknya dan satu orang lagi dan memberitahu mereka apa yang telah terjadi dan atas nasihat mereka telah menyerah diri kepada pihak polis. Tindakan sedemikian tidak konsisten dengan tindakan seseorang yang mempunyai niat untuk membunuh si mati (lihat perenggan 31).

(4) Berkaitan dengan keterangan pakar patologi bahawa tekanan di leher untuk lebih kurang 30 saat boleh menyebabkan kematian oleh afiksia, mahkamah berpendapat bahawa pandangan itu adalah tidak mencukupi untuk menunjukkan niat untuk membunuh. Ia adalah kewajipan atas pendakwaan untuk menunjukkan bahawa responden mempunyai pengetahuan yang menekan leher seseorang selama 30 saat mungkin boleh menyebabkan kematian oleh afiksia (lihat perenggan 32).]

Notes

For cases on intention, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1629–1641.

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Cases referred to

PP v Sanin bin Othman [2011] 5 MLJ 716, CA (distd)
Tan Hoi Hung v PP [1966] 1 MLJ 288, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Evidence Act 1950 s 7
Penal Code ss 299, 300, 302, 304(a)

Appeal from: Criminal Trial No 45A-195 of 2008 (High Court, Shah Alam)

Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Geethan Ram Vincent (Salehuddin Saidin & Assoc for the respondent.

Abdul Aziz Ab Rahim JCA (delivering judgment of the court):

[1] On 1 March 2008, the respondent ('the accused before the High Court') went to see some members of his family and informed them that he had strangled his girlfriend Siti Hajar binti Abd Razak ('the deceased') when they were having a quarrel at their house at No CTN-22, Tingkat 15, Grandeur Tower, Jalan Pandan Indah 1/16, Ampang in the district of Ampang Jaya in the State of Selangor.

[2] According to the evidence, the quarrel started when the deceased rejected the respondent's proposal to marry her. During the quarrel that had ensued and driven by anger, the respondent had strangled the deceased. The respondent then left the house to calm himself. Shortly after, the respondent returned and tried to revive the deceased but he found that the deceased was already dead.

[3] The respondent then went to see his auntie ('SP14'), his father ('SP13') and his uncle ('SP5'). On their advice, the respondent surrendered himself to the police. The respondent was taken to Pandan Indah Police Station by SP5 and SP13 on the same day. A police report ('exh P47') was lodged with SP15, a police officer at Pandah Indah Police Station.

[4] SP15 and several police personnel took the respondent to the scene of the incident. Using the key obtained from the respondent, SP15 and his team entered the room where the body of the deceased was found. The deceased's body was covered with a blanket and the respondent identified the body as that of his girlfriend.

[5] A postmortem was conducted on the deceased by SP19, the pathologist, who testified that the cause of death was asphyxia due to manual strangulation.

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[6] The respondent was charged with an offence of murder of the deceased under s 302 of the Penal Code. After a full trial, at the end of the defence case, the trial judge reduced the charge to one of culpable homicide not amounting to murder under s 304(1) of the Penal Code. The respondent was found guilty and was convicted on the said reduced charge. The respondent was sentenced to 20 years imprisonment.

[7] In her grounds of judgment dated 2 September 2012, the learned High Court judge gave the following reasons for her decision:

(1) The court was satisfied that the accused had no intention whatsoever to kill the deceased or to cause such bodily injury which he knew would in the ordinary cause of events cause her death;

(2) The court was satisfied that the act which caused the death of the deceased was an act of passion committed while he was enraged because of the grave and sudden provocation on the part of the deceased as she had promised to marry him, had caused the breakdown of his marriage but had refused to marry him, had taunted him, had made disparaging remarks about his two children who he loved dearly and she also had another lover while she was already in a committed relationship with the accused and his sudden rage had deprived him of his ability to form the requisite intention to willfully and deliberately cause the death of the deceased or such injuries which were likely to cause her death;

(3) The DNA report which was produced by the DNA expert showed that the deceased had another lover and this could have been the real reason why she had changed her mind about wanting to marry the accused after having promised to marry the accused and that she had kept this information from the accused and it reinforced the accused's defence that he was frustrated because the deceased had refused to accept his many proposals of marriage;

(4) The pathologist who had performed the post-mortem examination on the deceased had testified that the deceased died almost instantaneously as a result of being strangled by the accused and hence there was a doubt created that the accused did not intend to cause the deceased's death because he had reacted in a fit of anger;

(5) The pathologist also said that there were no defence injuries on the deceased because she was either too drunk or was sleeping when the accused pressed her neck with both his hands and a doubt was created that because the deceased was drunk it was possible that she had said all the words which the accused had claimed she had said during their lovers' quarrel and which had incensed him and deprived him of the ability to form the requisite mens rea to kill her or to cause such injuries which will in the ordinary course of events cause her death;

(6) Since the death of the deceased occurred so fast and there was no evidence to show that the accused had really wanted to kill her by strangling her and that he had only pressed his two hands against her neck to shake her and to make her realise the intensity and sincerity of his marriage proposal the court was of the view that the defence of the accused had cast a doubt on the prosecution case on the original charge of murder;

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(7) The reaction of the accused was such that he had without realising it used excessive force but there was no intention on his part to kill the deceased or to cause such injuries as were likely in the ordinary cause of events to cause her death; and

(8) The defence of the accused was put forward at the outset from the time he informed his relatives to the time they testified in court as prosecution witnesses and, therefore, his evidence was consistent and, inherently credible and was accepted by the court.

[8] Not satisfied with the decision of the learned High Court judge, the appellant (ie 'the public prosecutor') now appeals to us. Having read the record of appeals, the written submissions filed by both the appellant and the respondent and having heard their respective oral submissions before us, we came to a unanimous decision that this appeal should be dismissed. We now give our reasons.

[9] In this case, the fact that the respondent had strangled the deceased's neck and that the respondent's DNA profile was found on the neck of the deceased was not in dispute. The primary issue in this case is whether the act of strangulation by the respondent that resulted in the death of the deceased was intentional and whether it was prompted by a sudden provocation in the heat of passion. It is also a fact that there was no defensive wounds found on the deceased.

[10] The appellant argued that the respondent had the intention to kill the deceased or to cause injuries which are sufficient in the ordinary cause of nature to cause death. The appellant relied mainly on the evidence of the pathologist, SP19. In his evidence, SP19 gave his opinion as follows:

(a) The death was not accidental but caused by manual strangulation.

(b) The left thyroid bone of the deceased was fractured and there were injuries on the deceased's neck.

(c) The bruises and wounds on the deceased's neck showed that the strangulation on the deceased's neck was for a considerable period.

(d) There was no defence injury found on the deceased which shows that the deceased was not defending herself when attacked and possibly the deceased was asleep or drunk when she was attacked.

(e) The deceased was lying on her left side when she was strangled.

(f) It was impossible the injuries was caused due to suffocation during sexual intercourse.

(g) There were bruises on the left cheek and mouth of the deceased caused by a punch or caused by punching and slapping.

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(h) It is possible that the attacker was in the state of anger when the attacker strangled the deceased.

[11] Harping on the evidence given by the pathologist as to the injuries to the neck of the deceased, the learned deputy public prosecutor ('DPP') for the appellant submitted that the intention to kill may arise instantaneously and at the moment the act that cause the death was performed. To support his argument, the learned DPP referred to us the case of *Public Prosecutor v Sanin bin Othman* [2011] 5 MLJ 716, where the Court of Appeal had said that it could never be overly emphasised that the intention can be formulated on the spot. The learned DPP further submitted that the neck is an important and vulnerable part of the human body. It is the link between the various respiratory organs that are found in the area between the nose and the lung. An act of strangulation she said, will prevent a person from breathing and could result in suffocation and eventually death. She further submitted that SP19 had given evidence that to strangle a person for 30 second is sufficient to cause the person to suffocate and result in death. She further submitted that SP19 had, in his evidence, ruled out that the act of strangulation of the deceased by the respondent is something that is accidental or unintentional. Therefore she argued that in this instant case, the act by the respondent in strangling the deceased was done intentionally.

[12] The learned DPP referred to us the case of *Tan Hoi Hung v Public Prosecutor* [1966] 1 MLJ 288, where intention is distinguished from motive. According to the case, intention indicates a person consciously shaping his conduct so as to bring about a certain result; whilst motive indicates the reason why he desires that result. The learned DPP therefore argued that if a man knowingly does something, then not only does he intend to do it, but in the absence of anything to the contrary, he must be taken to have intended the natural and probable consequences of his act.

[13] It is a fact that intention is a matter of inference. The learned High Court judge in her judgment had ruled out intention of the respondent to kill the deceased. On this point, the learned High Court judge had said as follows:

> (4) The pathologist who had performed the post-mortem examination on the deceased had testified that the deceased died almost instantaneously as a result of being strangled by the accused and hence there was a doubt created that the accused did not intend to cause the deceased's death because he had reacted in a fit of anger.

[14] The learned DPP submitted that this finding by the learned High Court judge is against the weight of the evidence in particular, the testimony of SP19 who said that manual strangulation normally causes death and pressing on the person's neck for 30 second could cause death. The learned DPP also attacked the finding of the learned High Court judge that:

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> (6) Since the death of the deceased occurred so fast and there was no evidence to show that the accused had really wanted to kill her by strangling her and that he had only pressed his two hands against her neck to shake her and to make her realise the intensity and sincerity of his marriage proposal the court was of the view that the defence of the accused had cast a doubt on the prosecution case on the original charge of murder.

and argued that the learned High Court judge had over simplified the evidence. She submitted that the injury to the deceased's neck caused by the respondent resulted in the fracture to the left side of the neck. Therefore she submitted, the finding by the learned High Court judge is not consistent with the act of the respondent to shake the deceased and to make her realise the intensity and the sincerity of his marriage proposal. Instead, the learned DPP submitted that the act of the respondent is much more than that. From the injuries suffered she said, it shows that excessive force was used over the deceased.

OUR VIEWS AND FINDINGS

[15] We accept the proposition by the learned DPP that intention is a matter of reference. That means, to establish a person's intention in doing an act, we look at the surrounding circumstances in which the act was done. These circumstances must not only be confined to the circumstances at the moment of the commission of the act, but also to circumstances that existed immediately before and after the event. We say so because s 7 of the Evidence Act 1950 (Act 56) states as follows:

> 7 Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity of their occurrence or transaction, are relevant.

[16] With regard to the circumstances that existed before the event, we only have the evidence of the respondent himself. In his testimony, the respondent had said that at that material time, he was married. He came to know the deceased in 2004. The deceased then was working as a GRO at Superstar Night Club Bukit Bintang. He testified further that he rented a room and stayed there with the deceased for about two years before the incident. The respondent said in his examination in chief that 'perhubungan saya dengan teman wanita saya (*deceased*) adalah seperti suami isteri' (Emphasis added.) The respondent testified that they were not married because the deceased refused to marry him and gave excuses such as she was not ready, but the respondent testified that he waited patiently because he loved her.

[17] With regard to the circumstances at the time of the incident, the respondent's testimony is as follows:

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Pada 9 Mac 2008, lebih kurang jam 2-3 petang, saya dan teman wanita bangun. Kami telah mengadakan perhubungan seks. Selepas itu saya telah minta dia berkahwin dengan saya. Dia memberi alasan kepada saya dia tidak sedia. Dia mempertikaikan saya selalu jumpa dengan anak-anak dan gunakan itu sebagai alasan untuk berjumpa dengan bekas isteri saya.

Dia suruh saya balik kepada isteri saya. Dia kata 'you gila dengan bekas isteri. You baliklah kepada bekas isteri you'. Saya rasa geram dengan kata-kata dia.

Saya pegang leher dia dan saya goncangkan 3-4 kali dan saya tampar dia. Saya pegang leher dia sekejap.

Saya ambil kunci kereta dia dan saya keluar untuk makan. Dia ada panggil saya.

Tapi saya frust. Saya tak peduli.

[18] The respondent also testified that the argument with the deceased was for about five to ten minutes and such arguments were quite often. As to the matter that was the subject of the arguments, the respondent testified as follows:

Bukan bertengkar dengan suara yang kuat. Dengan perasaan saya. Dia selalu kata bekas isteri saya dan minta saya balik kepada bekas isteri saya. Sedangkan saya telah tinggalkan bekas isteri saya dan anak-anak saya untuk duduk bersama dengan dia. Dia telah janji untuk berkahwin dengan saya. Kalau saya mahu bekas isteri saya, saya tidak akan bercerai dengan bekas isteri saya.

[19] With regard to the circumstances that existed and the conduct of the respondent after the incident, the respondent stated that after leaving the house, after the quarrel, he went to have a meal at Stephen Corner, Pandan Indah. He was there for about one and a half hours. He called the deceased's handphone but there was no reply. So, he decided to return to the house and he bought a package of 'keropok' which he said is the favourite of the deceased. On reaching the house, he saw the deceased lying down and was dead. The respondent said he was shocked because the quarrel was only for a short while. The respondent's testimony is as follows:

Selepas minum saya telah call handphone dia tapi dia tidak menjawab.

Saya pergi untuk membeli keropok favourite kerana biasa kalau kami bertengkar dan saya beli keropok untuk dia, dia akan baik semula.

Apabila saya balik saya tengok dia terbaring dan tidak bernyawa lagi.

Saya pun terkejut. Kerana kami hanya bergaduh sebentar.

[20] The respondent then testified that he covered the deceased with a blanket and he returned to his kampung and met with his family. He told his family that he had quarreled with the deceased but he did not know how she had died. He told the story to one Mohd Ali bin Bakri, his auntie and his father.

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All of them told him to lodge a report if he did not know how the deceased died. The respondent agreed and lodged a report at Pandan Indah Police Station.

[21] In so far as the act of the strangulation of the deceased's neck, the respondent testified that he held the neck of the deceased not to kill her. He said he held the neck only for a short while. He further said that he was angry at the deceased and wanted to let off his anger. The respondent denied in his testimony that he punched the face or the mouth of the deceased.

[22] In cross-examination the respondent denied that he did not realise how long he had held the neck of the deceased. He also denied any intention to kill the deceased. The respondent further denied that he had made up the story about the 'keropok' and that he had returned to the house after the incident. In cross-examination also the respondent said that he did not immediately report to the police after he discovered the deceased was dead because he was afraid. This testimony of the accused found favour with the learned High Court judge.

[23] The learned High Court judge in her grounds of judgment had stated as follows:

> The court was satisfied that the act which caused the death of the deceased was an act of passion committed while he was enraged because of the grave and sudden provocation on the part of the deceased as she had promised to marry him, had caused the breakdown of his marriage but had refused to marry him, had taunted him, had made disparaging remarks about his two children who he loved dearly and she also had another lover while she was already in a committed relationship with the accused and his sudden rage had deprived him of his ability to form the requisite intention to willfully and deliberately cause the death of the deceased or such injuries which were likely to cause her death.

[24] The learned judge also found, on the evidence that intention was not proven. This is what the learned judge said in her judgment:

> Since the death of the deceased occurred, so fast and there was no evidence to show that the accused had really wanted to kill her by strangling her and that he had only pressed his two hands against her neck to shake her and to make her realise the intensity and sincerity of his marriage proposal the court was of the view that the defence of the accused had cast a doubt on the prosecution case on the original charge of murder;
>
> The reaction of the accused was such that he had without realising it used excessive force but there was no intention on his part to kill the deceased or to cause such injuries as were likely in the ordinary cause of events to cause her death; and

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The defence of the accused was put forward at the outset from the time he informed his relatives to the time they testified in court as prosecution witnesses and, therefore, his evidence was consistent and, inherently credible and was accepted by the court.

[25] The offence of culpable homicide and of murder have been defined under s 299 and s 300 of the Penal Code, respectively. The distinction between these two sections had been discussed by high authority in so far as the intention of the doer of the act is concerned. Such authority is the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC). To appreciate this distinction we can do no better than to produce the relevant passages in that case in extenso. In that case, the Federal Court speaking through the judgment of Raja Azlan Shah FJ (as His Royal Highness then was) had said:

A more difficult question that called for decision in this case was the offence of which the appellants should have been convicted. That was the other important ground of appeal, namely, that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted. In amplification of this ground of appeal we feel that it is the proper practice in cases of personal violence resulting in death for the judge to direct the jury on the right issue, in such a case as this, to arrive at a conclusion as to the degree of mens rea in the minds of the appellants. It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow. In actual practice however it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.

We therefore intend to deal at some length to emphasise and to discuss the distinctions between the provisions of s 299 of the Penal Code and s 300 of the Penal Code.

Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that ... the act is likely to cause death.

Section 300 of the Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such

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bodily injury to any person, and ... is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

The words which I have italised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no. intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of s 300 of the Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of ss 299 and 300 is the tenuous contention that s 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within s 300, it cannot be one of culpable homicide not amounting to murder punishable under s 304 of the Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. The first part of s 304 of the Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300, cll (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 299, but not within s 300, cll (2) and (3). The second part of s 304 of the Penal Code covers cases falling within the third part of s 299 not falling within s 300, cl (4).

[26] In *Tham Kai Yau & Ors* the Federal Court emphasised the point that whether the offence is culpable homicide or murder depends on the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. The Federal Court also said that culpable homicide may not amount to a murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is

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present, but not the special degree of mens rea referred to in s 300 of the Penal Code. The Federal Court also caution that all cases falling within s 300 of the Penal Code must necessarily fall within s 299 but not all cases within s 299 fall within s 300 of the Penal Code.

[27] Bearing in mind the above views expressed by the Federal Court with regard to the distinction between s 299 and s 300 of the Penal Code, and having reviewed the defence advanced by the respondent in this appeal, we are in agreement with the finding of the learned High Court judge that the prosecution had failed to prove intention. At this point we wish to state that in our view the defence of sudden and grave provocation may not be available to the respondent; however, the absence of such provocation does not absolve the prosecution from the burden of proving intention on the part of the respondent to cause the death of the deceased.

[28] The evidence in this case is that the respondent was filled with anger when the deceased rejected his proposal for marriage. In that spate of anger, the respondent had said that he grabbed the deceased by the neck and shook her in the heat of passion to drive some sense into the deceased regarding the seriousness of his proposal. The respondent had already left his wife and children and came to live with the deceased, in a rented room, like husband and wife. In such circumstance, we are of the view that the reaction shown by the respondent towards the deceased at the spur of the moment was natural. We do not think that the thought of killing the deceased had ever cross the mind of the respondent on the rejection of his marriage proposal by the deceased. We are of that view because the evidence shows that the respondent was in love with the deceased to the extent that he was willing to leave his wife and children for the deceased. The learned High Court judge had judicially appreciated the evidence of the state of mind of the respondent when the respondent shook the deceased by holding her neck. The learned judge said:

> Her spoken words had incensed and enraged him and he lost his composure and self control. On the spur of that moment, in a fit of rage, he held her neck momentarily with his hands and started to shake her three to four times hoping to make her realise that he was really serious in wanting to marry her. He was laso hoping that she would appreciate his sincerity and agree to marry him. He also slapped her.
>
> He was incensed because his love for her had led to the breakdown of his marriage. This in turn caused him a lot of pain and suffering because his marriage had produced two children who were still young. He loved them very dearly but he could not see them as often as he wished after his divorce.

[29] We observe that the evidence also shows that the police investigation had found a male DNA profile which the DNA expert PW16 had labeled as Male X from a seminal stain on a blanket in the room where the deceased body was found. However, we do not find any evidence to show that at the time the

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respondent was shaking the deceased by holding her neck, this fact about the Male X was ever known or disclosed to the respondent. We mention this to show, by process of elimination, that the presence of another male person in the life of the deceased as evidenced by the finding of the Male X's DNA profile by PW16 is not a relevant factor in assessing the intention of the respondent to kill the deceased out of jealously or anger because of the presence of the unknown male person.

[30] The facts of this appeal are also distinguishable from the facts in *Public Prosecutor v Sanin bin Othman* [2011] 5 MLJ 716, cited by the prosecution. The accused in that case was charged with murder in the first instance but the trial court convicted the accused on an amended charge of culpable homicide not amounting to murder under s 304 of the Penal Code. On appeal to the Court of Appeal by the prosecution against the reduction in the charge, the appeal was allowed and the accused was convicted on the original charge of murder under s 302 of the Penal Code. In *Sanin*'s case the accused had entered a shop armed with a knife with intention to commit robbery. In the course of committing the robbery, the accused had stabbed the deceased with the knife. On such evidence the Court of Appeal in *Sanin*'s case found that the accused had the intention to cause bodily injury to the deceased, and the bodily injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death.

[31] The act and conduct of the respondent almost immediately after the event in this case also do not show the presence of intention to kill. It is uncontroverted fact that upon his return to the house after he had calmed himself at the nearby coffee shop and discovered that the deceased was dead, the respondent immediately went to see his father, his uncle and another person. The respondent told them what had happened. On their advice, the respondent surrendered himself to the police. In our mind, such conduct is not consistent with the conduct of a person who had every intention to kill the deceased.

[32] With regard to the evidence of the pathologist, PW19 that a pressure to the neck of the deceased for about 30 second would be sufficient to cause asphyxia and resulted in death, we are of the view that it is insufficient to show intention to kill. In our opinion it is incumbent on the prosecution to show that the respondent had knowledge that pressing one's neck for 30 second would probably cause death due to suffocation or asphyxia. As we have said earlier, and also found by the learned High Court judge, the respondent in a fit of rage or anger had grabbed the deceased's neck and shook her violently. This evidence was consistent throughout the prosecution and the defence case and the learned High Court judge had found it inherently credible. Therefore, we are in agreement with the learned High Court judge that at the spur of the

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moment, the respondent had, without realising, used excessive force; but with no intention to kill the deceased or to cause such injuries as were likely in the ordinary cause of event to cause the deceased's death.

[33] For the above reasons, we are unanimous that this appeal should be dismissed and the finding and sentence by the learned High Court judge is hereby affirmed.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar